SALES—MITIGATION OF DAMAGES BY SELLER WHERE BUYER WRONGFULLY REFUSES TO ACCEPT THE GOODS.—In a Virginia case decided in 1868 the doctrine was laid down that, a buyer having wrongfully refused to accept goods, the fact that the seller retained them for over two months, while their market value was rapidly declining, before offering for sale did not prevent recovery of the difference between the contract price and the purchase price received.[1] This question has not been presented since the decision of this case so that the doctrine as there enunciated is the law in Virginia today.

When a buyer wrongfully refuses to accept goods delivered upon a contract of sale, the seller, by the rule in the majority of States, has his choice of three remedies. First, he may hold the goods as bailee for the buyer and sue for the contract price. Secondly, he may treat the goods as his own and sue for the difference between the market value at the time of the breach and the contract price. Thirdly, he may resell the goods and sue for the difference between the contract price and the price obtained on the resale.[2]

However, it is easily conceivable that circumstances might arise which would render one of these courses extremely disadvantageous to the buyer without a corresponding advantage to the seller. Such circumstances would result from a fluctuating market in which the value of the chattel sold is rapidly decreasing. Or the chattel might be of such a perishable character that its retention by the seller as bailee for the buyer would render it absolutely worthless. Again, the expense incident to the retention of the goods for which the buyer is liable might be very great. An example of this latter case would be the retention of live stock for an extended period after repudiation of the contract by the buyer.[3] Under these exceptional circumstances to allow the seller to collect expenses of upkeep as well as the difference between the contract and the purchase price, where the sale was intentionally or carelessly delayed by the seller, would encourage a disgruntled seller to select the course most disadvantageous to the buyer. Public policy would seem to demand that the damages in any situation be mitigated as far as possible. Why should a seller be permitted to sit by and allow a supply of goods to perish or a value to be lost, resting secure in the assurance that the consequences of his inertia must be paid for by the buyer?

Of course the answer to these arguments is that it was the buyer who repudiated the contract—and that his remedy is to perform the terms of sale and take possession of the goods. The refusal of the buyer might, however, be based upon an honest mistake of law or fact which could only be determined by reference to a court and therefore subject to delay. The courts hold generally in the law of damages that the person injured must minimize the injury to the

[1] Rosenbaum *v.* Weeden, etc., Co., 59 Va. 785, 98 Am. Dec. 737 (1868).
[2] See Dunston *v.* McAndrews, 44 N. Y. 72 (1870); TIFFANY ON SALES (2nd. ed.) 343, and cases there cited.
[3] Thurman *v.* Wilson, 7 Ill. App. 312 (1880).

best of his ability by appropriate action.[4] There seems to be no reason why this rule should not apply in the cases under consideration.[5]

In the instant case the buyer had absolutely repudiated the contract. The market value of the chattels was rapidly decreasing. This fact was known to the seller who nevertheless did not elect to offer them for sale for more than two months. The Virginia Court held that the seller could recover the difference between the contract and the purchase price. The decision was based upon the ground that inasmuch as the seller might hold the goods indefinitely, he should be at liberty to sell at any time. Under the circumstances of this case to delay the sale inevitably meant an increase of the damage. And where this is true, we believe that the seller should be confined to the choice of one of two remedies. He should either retain the goods as his own, suing for the difference between the market value at the time of the breach and the contract price; or else he should *promptly* offer the goods for resale and hold the buyer for the difference between the price received and the contract price.

J. H. T.

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[4] Warren *v.* Stoddart, 105 U. S. 224, 26 L. Ed. 1117 (1881); Stonega Coke, etc., Co. *v.* Addington, 112 Va. 807, 73 S. E. 257; Pierce *v.* Cornell, 117 App. Div. 66, 102 N. Y. S. 102 (1907).

[5] See Zinsmeister *v.* Rock Island, etc., Co., 145 Ky. 25, 139 S. W. 1068 (1911); Beaumont Cotton, etc., Co. *v.* Sanders (Tex.), 203 S. W. 372 (1918); WILLISTON ON SALES § 559.